

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TOMMIE LEE MCDOWELL, JR.,

Plaintiff,

v.

WILLIAM REUBART, *et al.*,

Defendants.

Case No. 3:19-cv-00230-MMD-CSD

ORDER

I. SUMMARY

Pro se Tommie Lee McDowell, Jr., who is currently incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), filed this case under 42 U.S.C. § 1983 arising out of events that occurred while he was incarcerated at Ely State Prison (“ESP”), generally alleging retaliation for filing grievances. (ECF No. 137 at 2-4.) Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 137 (“R&R”)),¹ recommending the Court grant Defendants Timothy Hulsey and William Reubart’s motion for summary judgment (ECF No. 118 (“Motion”)). McDowell timely filed an objection to the R&R (ECF No. 138 (“Objection”)), and Defendants filed a response to McDowell’s Objection (ECF No. 146 (“Response”)). Also before the Court is McDowell’s motion for sanctions relating to Reubart’s alleged failure to respond to discovery requests.² (ECF No. 133 (“Sanctions Motion”).) As further explained below, the Court will deny McDowell’s Sanctions Motion and overrule his Objection to Judge Cobb’s

¹Judge Cobb retired after issuing the R&R. (ECF No. 147.) United States Magistrate Judge Craig S. Denney now presides over this case. (*Id.*)

²Defendants did not file a response to the Sanctions Motion, and McDowell did not file a reply.

1 R&R, accepting Judge Cobb's R&R in full and accordingly granting Defendants' Motion,
2 because the Court agrees with Judge Cobb's analysis provided in the R&R and finds
3 McDowell's Objection unpersuasive.

4 **II. BACKGROUND**

5 McDowell is currently proceeding on three counts alleging retaliation. (ECF No. 137
6 at 2-4.) In Count I, McDowell alleges that Hulsey confiscated his property in retaliation for
7 McDowell threatening to file a grievance and asking for an emergency grievance form. (*Id.*
8 at 3.) In Count II, McDowell alleges that Hulsey further retaliated against him by keeping
9 his property for nearly two weeks before giving it back because McDowell wrote
10 grievances. (*Id.*) In Count IV, McDowell alleges that Reubart reactivated a detainer
11 imposed on McDowell by the Florida Department of Corrections ("Florida Detainer") in
12 retaliation for McDowell filing this lawsuit. (*Id.* at 4.)

13 In their Motion, Defendants argue they are entitled to summary judgment on these
14 three claims because McDowell did not properly exhaust his administrative remedies, his
15 claims fail on their merits, and they are alternatively entitled to qualified immunity. (*Id.* at
16 4.)

17 The Court incorporates by reference Judge Cobb's recitation of the legal standard
18 governing review of summary judgment motions from the R&R. (*Id.* at 4-6.) Judge Cobb
19 recommends the Court grant the Motion because the undisputed evidence before the
20 Court shows McDowell's claims fail on the merits. (*Id.* at 15-24.) Judge Cobb rejected
21 Defendants' argument that McDowell failed to properly exhaust his administrative
22 remedies because those remedies were practically unavailable to him (*id.* at 7-15)³ and
23 did not address Defendants' remaining arguments—including qualified immunity—
24 because Judge Cobb recommends the Court find McDowell's claims fail on their merits at
25 this stage of the litigation (*id.* at 24).

26 As to the merits of McDowell's claims, Judge Cobb first recommends the Court
27

28 ³Defendants did not object to these recommendations. (ECF No. 146.)

1 grant summary judgment to Hulsey on Count I because there is no evidence that Hulsey
2 actually participated in the confiscation of McDowell's property, and Hulsey's pertinent
3 interactions with McDowell undisputedly occurred before McDowell mentioned filing
4 grievances or allegedly asked for an emergency grievance form in any event. (*Id.* at 15-
5 19.) Judge Cobb next recommends the Court grant summary judgment to Hulsey on Count
6 II because there is no genuine dispute that Hulsey was not involved in returning
7 McDowell's property to him. (*Id.* at 19-20.) Judge Cobb finally recommends the Court grant
8 summary judgment to Reubart on Count IV because the admissible evidence before the
9 Court demonstrates Reubart was not involved in the activation or deactivation of the
10 Florida Detainer, nor was he involved in cancelling McDowell's classification hearing. (*Id.*
11 at 20-24.)

12 Judge Cobb also addressed McDowell's Sanctions Motion in passing in the R&R
13 but erroneously stated the Court denied the Sanctions Motion in one of its prior orders
14 (ECF No. 135). (ECF No. 137 at 2.) The Court stated in that order that it was not
15 addressing the Sanctions Motion. (ECF No. 135 at 1.) Regardless, Judge Cobb writes
16 regarding the Sanctions Motion:

17 It should be noted that Plaintiff did not include a request under Federal Rule
18 of Civil Procedure 56(d), asserting that he cannot present facts essential to
19 justify his opposition with respect to the claim proceeding against Reubart.
20 In fact, in the motion for sanctions Plaintiff represents that he "has
undoubtedly mounted sufficient arguments against [the motion for summary
judgment]." (ECF No. 133 at 2.)

21 (ECF No. 137 at 2.) Judge Cobb does not address the Sanctions Motion in the conclusion
22 of the R&R. (*Id.* at 24-25.) However, from the quote above, Judge Cobb implicitly
23 recommends the Court deny the Sanctions Motion. And as noted *supra*, neither
24 Defendants nor McDowell filed a response to, or a reply in support of, the Sanctions
25 Motion, though the time for doing so has elapsed. It is accordingly possible that Judge
26 Cobb and the parties have been operating under the assumption that the Court has
27 already denied the Sanctions Motion. But because it does not appear to the Court that it
28 has already denied the Sanctions Motion—though the Court will deny the Sanctions

1 Motion—the Court will also address it *infra* in this order.

2 **III. LEGAL STANDARD**

3 This Court “may accept, reject, or modify, in whole or in part, the findings or
4 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party
5 timely objects to a magistrate judge’s report and recommendation, then the Court is
6 required to “make a de novo determination of those portions of the [report and
7 recommendation] to which objection is made.” *Id.* The Court’s review is thus de novo
8 because McDowell filed his Objection.⁴ (ECF No. 138.)

9 **IV. DISCUSSION**

10 The Court first addresses McDowell’s Sanctions Motion (ECF No. 133), and then
11 addresses the pending R&R and McDowell’s Objection to it (ECF Nos. 137, 138).

12 **A. McDowell’s Sanctions Motion**

13 McDowell seeks sanctions because Reubart allegedly did not respond to his
14 discovery requests. (ECF No. 133.) McDowell specifically asks that the Court strike an
15 unspecified portion of Defendants’ Motion and Defendants’ reply in support of their Motion
16 in its entirety. (*Id.* at 4.) However, as Judge Cobb noted in the R&R, McDowell does not

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18 ⁴Defendants erroneously state in their Response that the clearly erroneous
19 standard of review applies. (ECF No. 146 at 2-3.) Defendants rely on LR IB 3-1. (ECF No.
20 146 at 2 (“A district judge may reconsider any pretrial matter referred to a magistrate judge
21 in a civil or criminal case under LR IB 1-3, when it has been shown the magistrate judge’s
22 order is clearly erroneous or contrary to law.”).) But that rule applies to matters that may
23 finally be determined by a magistrate judge in civil cases. See LR IB 3-1. Here, the Court
is reviewing Judge Cobb’s Recommendation that the Court grant Defendants’ Motion.
(ECF No. 137.) LR IB 1-4(c) provides that motions for summary judgment may not be
finally determined by Magistrate Judges. Accordingly, LR IB 3-2—not LR IB 3-1—applies
to the Court’s review of the R&R. The Court’s review of the R&R is accordingly *de novo*
as to those portions of the R&R that McDowell objects to. See LR IB 3-2(b).

24 This is hardly the first time the Court has noticed this error from the Nevada Attorney
25 General’s office. See, e.g., *Pearson v. Dzurenda*, Case No. 3:19-cv-00031-MMD-CSD,
26 ECF No. 75 at 3 n.2 (D. Nev. Feb. 14, 2021) (including a nearly identical footnote to the
27 footnote above in a nearly identical situation, but where the error came from a different
28 attorney employed by the Nevada Attorney General’s office, suggesting the error is office-
wide). The Court respectfully requests that the Nevada Attorney General’s office update
its forms that its attorneys are presumably using to include the correct legal standard
depending on the type of motion the Magistrate Judge is ruling on, and whether there is
an objection to a Report and Recommendation. See *also* 28 U.S.C. § 636; LR Part IB
(governing Magistrate Judges).

1 make his request under Rule 56(d). (ECF No. 137 at 2.) And McDowell's failure to do so
2 is not a mere procedural violation. Rule 56(d) exists for the situation where a nonmovant
3 like McDowell "cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P.
4 56(d). Said otherwise, to avoid entry of summary judgment against him—which appears
5 to be the purpose of McDowell's Sanctions Motion—McDowell must be able to explain
6 what information he is missing and why that information would help him oppose the
7 Motion. McDowell has not done that in his Sanctions Motion. Indeed, he states that "has
8 undoubtedly mounted sufficient arguments against [the motion for summary judgment]."
9 (ECF No. 133 at 2-3.) McDowell accordingly concedes that any information he may not
10 have obtained from Reubart in discovery is immaterial to the Court's consideration of the
11 Motion. The Court will therefore deny McDowell's Sanctions Motion and move on to
12 consider the Motion through the R&R and McDowell's Objection to it.

13 **B. The R&R and McDowell's Objection**

14 To start, the Court agrees with and adopts Judge Cobb's analysis provided in the
15 R&R. (ECF No. 137.) McDowell raises several arguments in his Objection. (ECF No. 138.)
16 Though the Court finds none of them persuasive, the Court briefly McDowell's primary
17 arguments here.

18 McDowell first argues that the Court should reject Judge Cobb's recommendation
19 to grant summary judgment to Hulsey on McDowell's Count I because McDowell maintains
20 that his property was taken on November 14 as part of his cellmate being moved, as
21 opposed to on November 16 because his cellmate received drugs in the mail, and because
22 Hulsey cannot be trusted because he said he was not working on November 14 when
23 McDowell says he was. (*Id.* at 4-9.) However, these disputes are immaterial to Judge
24 Cobb's recommendation. Indeed, Judge Cobb noted in the R&R that it does not matter
25 what day McDowell's property was allegedly taken because Hulsey presented evidence
26 that he was not involved with the confiscation of McDowell's property, and McDowell did
27 not present any admissible evidence tending to show to the contrary. (ECF No. 137 at 18-
28 19.) The Court agrees with Judge Cobb. And in this portion of McDowell's Objection, he

1 does not point to any new evidence, instead reiterating that he has consistently alleged
2 Hulsey was involved in confiscating his property. (ECF No. 138 at 4-9.) Pointing to mere
3 allegations and arguments is insufficient to avoid summary judgment on Count I on the
4 record before the Court.

5 McDowell next argues that the Court should reject Judge Cobb's recommendation
6 to grant summary judgment on McDowell's Count II because he had discussions with
7 Hulsey during the time his property had been taken from him. (*Id.* at 9-11.) However, this
8 argument is basically equivalent to McDowell's statement in his declaration that he had
9 discussions with Hulsey about returning his property while the property was not in
10 McDowell's possession that Judge Cobb discussed in the R&R. (ECF No. 137 at 19-20.)
11 And as Judge Cobb stated in the R&R, "[n]or does Plaintiff explain what the conversations
12 with Hulsey entailed to demonstrate that Hulsey engaged in adverse action because of
13 Plaintiff's protected conduct." (*Id.* at 20.) The Court rejects McDowell's argument in his
14 Objection regarding Count II for the same reasons Judge Cobb rejected the same
15 argument in the R&R. (*Id.* at 19-20.)

16 McDowell then argues the Court should reject Judge Cobb's recommendation as
17 to McDowell's Count IV but effectively concedes Judge Cobb's recommendation is correct
18 in stating that the Florida Detainer was never truly deactivated. (ECF No. 138 at 13.) As
19 Judge Cobb explained in the R&R, because the Florida Detainer was never deactivated—
20 it merely appeared so because of an unfortunate error on NDOC's part based on a letter
21 that McDowell appears to have obtained from a corrections official in Florida—Reubart
22 could not have retaliated against McDowell (even setting aside the undisputed evidence
23 that Reubart was not involved in decisions about detainers). (ECF No. 137 at 20-24.) This
24 situation is unfortunate in the sense that McDowell thought for some time that he was no
25 longer subject to the Florida Detainer and that turned out not to be true. But the unfortunate
26 element of this situation does not affect the Court's view that Judge Cobb makes the
27 correct recommendation on Count IV based on the undisputed evidence before the Court.
28 And to the extent McDowell attempts to again argue in his Objection that the Florida

1 Detainer should be removed from his NDOC file, the Court cannot grant him that relief in
2 this case even if the Court agreed the Florida Detainer should be removed—and the Court
3 does not. (ECF No. 138 at 14-19.) The undisputed evidence before the Court shows that
4 the Florida Detainer was never deactivated or reactivated—McDowell merely and
5 unfortunately received a partially incorrect letter that led him to believe it was. (ECF No.
6 118-4.)

7 The Court thus overrules McDowell's Objection. The Court will therefore accept and
8 adopt Judge Cobb's R&R in full.

9 **V. CONCLUSION**

10 The Court notes that the parties made several arguments and cited to several cases
11 not discussed above. The Court has reviewed these arguments and cases and determines
12 that they do not warrant discussion as they do not affect the outcome of the issues before
13 the Court.

14 It is therefore ordered that McDowell's objection (ECF No. 138) to the Report and
15 Recommendation of United States Magistrate Judge William G. Cobb is overruled.

16 It is further ordered that McDowell's motion for sanctions (ECF No. 133) is denied.

17 It is further ordered that the Report and Recommendation of United States
18 Magistrate Judge William G. Cobb (ECF No. 137) is accepted and adopted in full.

19 It is further ordered that Defendants' motion for summary judgment (ECF No. 118)
20 is granted.

21 The Clerk of Court is directed to enter judgment accordingly—in Defendants'
22 favor—and close this case.

23 DATED THIS 17th Day of February 2022.

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26 MIRANDA M. DU
27 CHIEF UNITED STATES DISTRICT JUDGE
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